

RODERICK HYMON,	)	
	)	
Petitioner,	)	2:09-cv-1124-RLH-LRL
	)	
vs.	)	<b>ORDER</b>
	)	
BRIAN WILLIAMS, <i>et al.</i> ,	)	
	)	
Respondents.	)	
	/	

## I. Background

<sup>1</sup> Petitioner was found not guilty on charges of Burglary and a second count of Assault with a Deadly Weapon.

1 of parole after ten years on Counts I and III and a single term of life with the possibility of parole  
2 after ten years on Count V to run consecutive to Count III. The Judgment of Conviction was entered  
3 on April 15, 2003.

4 Petitioner appealed raising claims of trial court error as to the habitual criminal  
5 enhancement, judicial misconduct, inadequate *Faretta* canvass, and *Anders/Sanchez* arguments.<sup>2</sup>  
6 The conviction was affirmed by the Nevada Supreme Court on May 26, 2005. *See Hyman v. State*,  
7 121 Nev. 200, 111 P.3d 1092 (2005). A petition for rehearing was denied.

8 On August 19, 2005, petitioner filed a petition for post-conviction relief in the state  
9 district court. The petition was denied and petitioner appealed, raising thirty-four grounds for relief.  
10 The Nevada Supreme Court affirmed denial of relief on post-conviction, but did order a hearing on  
11 pre-trial detention credits and a new sentencing to properly address the habitual criminal  
12 enhancements. New counsel was appointed for re-sentencing, which was finally conducted on  
13 March 12, 2008. Petitioner was sentenced to three concurrent ten to twenty-five year terms.

14 In a subsequent state post-conviction petition, petitioner claimed his sentence was  
15 invalid “under the constitutional guarantees of due process of law, equal protection of the laws and a  
16 reliable sentence due to eneffective [sic] assistance of counsel.” Exhibit 122.<sup>3</sup> This petition was  
17 denied and the denial was upheld on appeal. The instant petition was dated May 27, 2009, and was  
18 filed with this court on June 29, 2009, after the matter of petitioner’s filing fee was resolved.

19 In his federal petition, petitioner raises some 45 claims for relief. The petition  
20 presents a pattern for most of the claims wherein he relies on a single statement of facts to support  
21

---

22 <sup>2</sup> *Feretta v. California*, 422 U.S. 806 (1975); *Anders v. California*, 386 U.S. 738 (1967) and  
23 *Sanchez v. State*, 85 Nev. 95, 450 P.2d 793 (1969).

24 <sup>3</sup> The exhibits referenced in this order were submitted by respondents in support of the motion  
25 to dismiss and are found in the court’s docket at numbers 11-14. Petitioner has also submitted exhibits  
26 in support of his response. Those exhibits are found at docket #18 and, if referenced, shall be identified  
as “Petitioner’s Exhibit \_\_\_\_.”

two or three separate constitutional theories. For example, his various claims of ineffective assistance of counsel are presented in triplicate one as a Fifth Amendment violation, one as a Sixth Amendment violation, and one as a Fourteenth Amendment violation, e.g., grounds one, two, and three each claim “Appellate Attorney on Direct Appeal Michael Schwarz was eneeffective [sic] on Direct Appeal Because he Refused to Raise as Requested that David Gruaman a Public Defender was a [sic] Agent of the State and was Eneffective [sic] at Preliminary hearing state of the process.” Docket # 3, pp 3-11. The claims each present additional, identical facts not stated here, and ground 1 claims a Fifth Amendment violation, ground 2 claims a Sixth Amendment violation, and ground 3 claims a Fourteenth Amendment violation.

## II. Motion to Dismiss

Respondents move to dismiss the petition arguing many of the claims are not cognizable federal claims, that his claims are unexhausted and that some claims are procedurally barred. Petitioner argues that he has presented federal issues and that he exhausted the claims for relief. Petitioner does not address the procedural bar argument.

### A. Ineffective Assistance of Counsel Claims.

Respondents move to dismiss numerous claims arguing that petitioner fails to present cognizable federal claims when he contends that he received ineffective assistance of counsel guaranteed independently by the Fifth Amendment and Fourteenth Amendment. On this basis, respondents argue that grounds 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 19, 21, 22, 24, 25, 27, 28, 30, 31, 33, 37, 39, and 40 should all be dismissed because there exists no independent Fifth or Fourteenth Amendment guarantees to the effective assistance of counsel.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court found that the Sixth Amendment right to counsel is a fundamental right essential to a fair trial and therefore binding on the states by way of the Fourteenth Amendment. *Id.* at 342, 83 S.Ct. at 795, *see also*, *Kansas v. Ventris* 129 S.Ct. 1841, 1844 -1845 (2009) (“The Sixth Amendment, applied to the States

1 through the Fourteenth Amendment, guarantees that “[i]n all criminal prosecutions, the accused shall  
2 ... have the Assistance of Counsel for his defence.”). Thus, the Fourteenth Amendment does not  
3 provide an independent guarantee of counsel or the effective assistance of counsel. Rather, it  
4 requires that states grant the Sixth Amendment guarantee of counsel to state court defendants.

5           Neither is there an independent right to the effective assistance of counsel guaranteed  
6 by the Fifth Amendment. There is a difference between the right to counsel protected by the Fifth  
7 Amendment (the right to the advice of counsel during questioning in a criminal investigation - the  
8 right not to incriminate oneself) and the Sixth Amendment right to the effective assistance of counsel  
9 at all critical stages of a criminal prosecution. *Patterson v. Illinois*, 487 U.S. 285 297-298 (1988).  
10 The core of this right has historically been, and remains today, “the opportunity for a defendant to  
11 consult with an attorney and to have him investigate the case and prepare a defense for trial.”  
12 *Michigan v. Harvey*, 494 U.S. 344, 348 (1990).

13           Because petitioner presents claims under the Fifth and Fourteenth Amendments which  
14 mirror the claims he makes under the Sixth Amendment, the Fifth and Fourteenth Amendment  
15 claims are superfluous and present no cognizable federal claim. Grounds 1, 3, 4, 6, 7, 9, 10, 12, 13,  
16 15, 16, 18, 19, 21, 22, 24, 25, 27, 28, 30, 31, 33, 37, 39, 40, and 42 will be dismissed. Additionally,  
17 the part of grounds 43 and 45 addressing ineffective assistance of counsel during the second  
18 sentencing shall be dismissed for the same reasons.

19           B.     Exhaustion

20           Respondents further argue that none of the grounds of the petition are exhausted  
21 because in state court he did not format his claims as individual constitutional rights violations but  
22 rather combined the constitutional bases of multiple guarantees into single claims. Respondents  
23 further argue that certain of the claims are unexhausted because he added new facts to support the  
24 claims before this court, or because he added an additional constitutional or different bases for a  
25 claim presented to the state court.

1 A federal court will not grant a state prisoner's petition for habeas relief until the  
 2 prisoner has exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S.  
 3 509 (1982); 28 U.S.C. § 2254(b).<sup>4</sup> State remedies have not been exhausted unless the claim has been  
 4 fairly presented to the state courts. *Carothers v. Rhay*, 594 F.2d 225, 228 (9th Cir. 1979). To fairly  
 5 present a federal claim to the state court, the petitioner must alert the court to the fact that he asserts a  
 6 claim under the United States Constitution. *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999),  
 7 *cert. denied*, 529 U.S. 1009 (2000), *citing Duncan*, 513 U.S. at 365-66. The petitioner must make  
 8 the federal nature of the claim "explicit either by citing federal law or the decisions of the federal  
 9 courts." *Lyons v. Crawford*, 232 F.3d 666, 668 (9th Cir. 2000), *amended*, 247 F.3d 904 (9th Cir.  
 10 2001). Additionally, a pro se petitioner may exhaust his claim by citing to State case law which  
 11 applies the federal standard. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (2003) ("citation to a state  
 12 case analyzing a federal constitutional issues serves the same purpose as a citation to a federal case  
 13 analyzing such an issue").

14 The mere similarity of claims of state and federal error is insufficient to establish  
 15 exhaustion. *Hiivala*, 195 F.3d at 1106, *citing Duncan*, 513 U.S. at 366; *see also Lyons*, 232 F.3d at  
 16 668-69; *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000). "[G]eneral appeals to broad  
 17 constitutional principles, such as due process, equal protection, and the right to a fair trial, are

---

18 <sup>4</sup> 28 U.S.C. § 2254(b) states, in pertinent part:

19 An application for a writ of habeas corpus on behalf of a person in  
 20 custody pursuant to the judgment of a State court shall not be granted  
 21 unless it appears that: (A) the applicant has exhausted the remedies  
 22 available in the courts of the State; or (B)(i) there is an absence of  
 available state corrective process; or (ii) circumstances exist that render  
 such process ineffective to protect the rights of the applicant.

23 \* \* \*

24 (c) An applicant shall not be deemed to have exhausted the remedies  
 25 available in the courts of the State, within the meaning of this section, if  
 26 he has the right under the law of the State to raise, by any available  
 procedure, the question presented.

1 insufficient to establish exhaustion.” *Hiivala*, 195 F.3d at 1106, *citing Gray v. Netherland*, 518 U.S.  
2 152, 162-63 (1996); *see also Shumway*, 223 F.3d at 987.

3           The fact that the state court does not explicitly rule on the merits of petitioner’s  
4 claims is irrelevant, because exhaustion requires only that the state court be given the opportunity to  
5 consider the claims that have been presented. *Smith v. Digmon*, 434 U.S. 332, 333-334, 98 S.Ct. 257,  
6 258 (1978); *Middleton v. Cupp*, 768 F.2d 1083, 1086 (9th Cir. 1985); *accord Carter v. Estelle*, 677  
7 F.2d 427 (5th Cir. 1982) and *United States ex rel. Giesler v. Walters*, 510 F.2d 887, 892 (3d Cir.  
8 1975).

9           Respondents’ argument that petitioner has failed to exhaust the legal bases for all of  
10 the claims in his instant petition because he presented his various claims to the state court under  
11 combined constitutional headings and in this case he presents the claims under individual  
12 constitutional headings is without merit. So long as the state court had an opportunity to consider the  
13 claims on the same constitutional and factual bases, it does not matter that some were combined and  
14 some were set out individually, so long as the same facts were relied on to support the same legal  
15 claims.

16           Next, respondents argue that petitioner has failed to exhaust the factual bases for his  
17 various claims as outlined below.

18           Grounds 1, 2, and 3<sup>5</sup>

19           In ground 2, petitioner argues that his appellate counsel was ineffective for refusing to  
20 raise a claim on direct appeal that trial counsel was an “Agent of The State” and was ineffective at  
21 the preliminary hearing stage of the process. Petitioner supports this ground with these facts: (1)  
22 counsel declined to request a physical line up for all eyewitnesses, creating a negative conflict

---

23  
24           <sup>5</sup> Respondents’ arguments for exhaustion are in the alternative to their argument that various  
25 claims do not present a viable federal constitutional claim. Because the court has already stated its  
26 intention to dismiss those non-viable claims, they will not be discussed for purposes of the exhaustion  
argument.

1 between counsel and petitioner; (2) counsel must have made negative comments to the magistrate  
2 regarding petitioner because the court and bailiff threatened to duct-tape petitioner's mouth when  
3 petitioner stated, "I'm not going to let that Public Defender Represent Me;" (3) and because  
4 petitioner sought a sixty day delay of the preliminary hearing to retain counsel or prepare for self-  
5 representation.

6 Respondents argue that petitioner has added new facts to this claim of ineffective  
7 assistance of counsel including the issue of the resulting conflict between counsel and petitioner and  
8 the situation allowed petitioner to lose a defense and the court to find probable cause because Ms.  
9 Crisman was able to change her story, eliminating preliminary hearing transcripts which could have  
10 been used for impeachment of Crisman. Respondents further note that petitioner never presented to  
11 the Nevada Supreme Court his argument under this claim that the trial court allowed an opposition to  
12 petitioner's motion to dismiss that did not include points and authorities.

13 Respondents are correct that part of the cited additional facts are absent from the  
14 opening brief on appeal of denial of the post-conviction writ of habeas corpus. However, petitioner  
15 did present his factual assertion that the appellate counsel failed to raise on direct appeal that the  
16 district court allowed "the state to file an opposition motion without points and authorities or raising  
17 every ground there of [sic] in motion to dismiss...." These facts are presented in support of  
18 petitioner's state claim number 23. However, claim 23 is an allegation that counsel was ineffective  
19 for not raising the issue that the district court misstated the law on larceny from the person during  
20 cross examination...."

21 "Fair presentation" of a prisoner's claim to the state courts means that the legal and  
22 factual substance of the claim must be raised there. The prisoner's allegations and supporting  
23 evidence must offer the state courts "a 'fair opportunity' to apply controlling legal principles to the  
24 facts bearing upon his constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (citing  
25 *Picard v. Connor*, 404 U.S. 270, 276-77 (1971)). Therefore, although a habeas petitioner will be  
26

1 allowed to present “ ‘bits of evidence’ ” to a federal court that were not presented to the state court  
 2 that first considered his claim, evidence that places the claims in a significantly different legal  
 3 posture must first be presented to the state courts. *Jones v. Hess*, 681 F.2d 688, 694 (10th Cir.1982)  
 4 (quoting *Nelson v. Moore*, 470 F.2d 1192, 1197 (1st Cir.1972)); *see also Kelley v. Small*, 315 F.3d  
 5 1063, 1069 (9<sup>th</sup> Cir. 2003).

6           Petitioner failed to give the state court a fair opportunity to review and remedy the  
 7 deficiencies presented in this claim. The facts he asserts in this claim were before the state court, but  
 8 not in relation to the issue of trial counsel being ineffective during preliminary proceedings. It is not  
 9 enough that a petitioner lay out a series of facts and expect the court to divine their significance to  
 10 any of the legal claim being reviewed. If the state court had been made aware of these facts as they  
 11 relate to the claim of counsel’s purported actions as a state agent, it would have reviewed the same  
 12 claim now before this court. It did not. Ground two is unexhausted.

#### 13           Grounds 4, 5, and 6<sup>6</sup>

14           In ground 5, petitioner claims he included a motion for discovery within his motion to  
 15 dismiss filed with the state court. He complains appellate counsel refused to raise a claim that the  
 16 state withheld “material Exculpatory” apparently including an investigation report that victim  
 17 Crisman’s purse, containing five dollars, was taken from a chair, rather than from Crisman’s hand  
 18 with the strap wrapped around her fingers. Petitioner argues the report prompted the prosecutor to  
 19 file the Third Amended Information in his criminal prosecution.<sup>7</sup>

20           Respondents argue this last assertion was never presented to the Nevada Supreme  
 21 Court on appeal from the denial of post-conviction relief, making the claim unexhausted. The court  
 22 finds the claim is exhausted. Petitioner’s assertion as to the filing of the Third Amended Information

---

23  
 24           <sup>6</sup> Grounds 4 and 6 will be dismissed as not raising a cognizable federal claim.

25           <sup>7</sup>Petitioner was ultimately tried on a Fourth Amended Information which restored the charges  
 26 to those as plead in the Second Amended Information. *Cf.* Exhibits 18 and 52.



1 does not change to the substance of the claim and the fact of the filing of the Third Amended  
 2 Information became moot with the filing of the Fourth Amended Information. Thus, the fact does  
 3 not does make the state and federal claims significantly different and it does not impact the analysis.  
 4 Ground five is exhausted.

5 Grounds 10, 11, and 12<sup>8</sup>

6 In ground 11, petitioner claims appellate counsel was ineffective for failing to raise  
 7 the claim that the court improperly denied him corrective lenses or a visit to an eye doctor despite  
 8 being “legally blind without glasses and that Petitioner can not [sic] see at all out of left eye.”  
 9 Petition, p. 30. Petitioner states the trial court entered an order for him to see an eye doctor, but then  
 10 the District Attorney had ex parte communications with the court which resulted in a reversal of that  
 11 order. Petitioner asserts that he was unable to see exhibits or witnesses’ and jurors’ facial  
 12 expressions.

13 A review of the opening brief on appeal reveals these facts being presented in support  
 14 of petitioner’s claim that appellate counsel was ineffective for not raising the claim that the district  
 15 court misstated the law on larceny from the person...” Exhibit 109, p. 22. Thus, the fact of the  
 16 District Attorney’s purported ex parte communications was not offered in support of this particular  
 17 claim. As previously stated, it is not the reviewing court’s obligation to take the total of the facts  
 18 argued and divine their importance or applicability to the various legal claims asserted. Ground 11  
 19 of the petition is unexhausted.

20 Ground 24<sup>9</sup>

21 Respondents argue that ground 24 is unexhausted because petitioner never presented  
 22

---

23 <sup>8</sup> Grounds 10 and 12 will be dismissed as not raising a cognizable federal claim.

24 <sup>9</sup> Grounds 22, 23, and 24 are identical factually, but 22 claims a Fifth Amendment violation  
 25 based on counsel’s performance, 23 claims a Sixth Amendment violation, and 24 claims a Fourteenth  
 26 Amendment violation. The court has already determined that 22 and 24 fail to state cognizable federal  
 claims. Thus this argument is rightfully targeted to ground 23.

1 the legal theory of a Sixth Amendment violation due to ineffective assistance of appellate counsel for  
 2 his failure to claim on appeal that petitioner's rights to due process and equal protection were  
 3 violated because the district judge was biased during the entire proceeding in that he received an ex  
 4 parte communication which was shared with the district attorney and then required petitioner to wear  
 5 a taser jacket during the trial without conducting a hearing.

6 On appeal of denied post-conviction relief, petitioner did not raise the issue of the  
 7 court's alleged bias in the context of the ineffective assistance of appellate counsel. Ground 23 is  
 8 unexhausted.

9 Grounds 28, 29, and 30<sup>10</sup>

10 Ground 29 alleges appellate counsel was ineffective for not raising the claim that  
 11 during cross examination of Crisman the district court misstated the law for larceny from the person.  
 12 Petitioner further alleges that Crisman's statement impeached her; that the reporting officers all  
 13 testified that Crisman never reported she had possession of the purse "from the onset," That the jury  
 14 instruction was broad and did not state "to commit larceny from person, property must be on person  
 15 from on set [sic]." Petitioner argues it cannot be harmless error when a bias [sic] judge misstates the  
 16 law for no reason but to assist the state to convict."

17 On appeal of denial of his post-conviction petition, petitioner never alleges that all the  
 18 reporting officers testified that Crisman never reported she had possession of the purse. He did argue  
 19 that the jury instruction was erroneous and insufficient, but he was not precise as to its deficiency.  
 20 The state courts did not receive "a 'fair opportunity' to apply controlling legal principles to the facts  
 21 bearing upon [petitioner's] constitutional claim." *Anderson v. Harless*, 459 U.S. at 6(citing *Picard* ,  
 22 404 U.S. at 276-77). Ground 29 is not exhausted.

23 Ground 35

24 In ground 35, petitioner claims a violation of his Sixth Amendment rights. He asserts

---

25 <sup>10</sup> Grounds 28 and 30 will be dismissed for failing to raise a cognizable federal claim.  
 26

1 that his appellate attorney raised on direct appeal the ground that the *Feretta* canvass was insufficient  
2 because the district court did not advise petitioner of the dangers, disadvantages and consequences of  
3 self representation, but the Nevada Supreme Court never ruled that petitioner had been so advised in  
4 order to waive counsel knowingly, voluntarily, and intelligently as required “by the precedents in all  
5 circuits of the federal court system. . . .”

6 Respondents point out that claim 25 of the opening brief on post-conviction appeal  
7 raises a Fifth and Fourteenth Amendment due process and equal protection claim with the same  
8 supporting facts, but never a Sixth Amendment claim.

9 Petitioner has failed to present his claim to the Nevada Supreme Court with the  
10 specific federal constitutional basis as he presents in this claims. Thus, ground 35 not exhausted.  
11 *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9<sup>th</sup> Cir. 2002); *Johnson v. Zenon*, 88 F.3d 828, 830 (9<sup>th</sup> Cir.  
12 1997).

13 Grounds 43, 44 and 45

14 These grounds for relief allege a violation of petitioner’s Fifth, Sixth, and Fourteenth  
15 Amendment rights, respectively, during sentencing in 2003 and 2008. He argues the district court  
16 erred in allowing the state to submit prior felony judgments without requesting that the judgments be  
17 entered as evidence. He further alleges that during his second sentencing, counsel was ineffective for  
18 allowing the court to adjudge petitioner a habitual criminal “as State did not submitt [sic] prior  
19 felony judgment of conviction and prove by prima facia evidence that petitioner should be sentenced  
20 as habitual criminal” per NRS 207.016.

21 Respondents argue the claims are not exhausted because petitioner never presented to  
22 the Nevada Supreme Court his allegations that appellate counsel was ineffective for failing to raise a  
23 claim challenging the failure of the State to submit the prior judgments of conviction as evidence at  
24 the first sentencing. Respondents argument is misplaced. The court does not find in petitioner’s  
25 claims 43, 44, and 45 any allegation that appellate counsel was ineffective. The ineffective  
26

1 assistance of counsel claim is directed at sentencing counsel. These claims are not exhausted  
2 because nowhere in his appeal brief on post-conviction does petitioner raise the specific sentencing  
3 issues he presents here. Rather, the petitioner argued before the Nevada Supreme Court that  
4 appellate counsel was ineffective for not raising a claim that the State used two felony convictions  
5 which were consolidated on the same complaint for habitual criminal (ground 11); the State use an  
6 infirm conviction for habitual criminal - battery by prisoner in a traffic stop (ground 12), and  
7 appellant's sentence is invalid under due process and equal protection because the Nevada Supreme  
8 Court did not rule on the issue of under which statute petitioner was adjudged a habitual criminal,  
9 NRS 207.010 or NRS 207.012 (ground 21). None of these claims present the same facts as the  
10 claims presented in grounds 43, 44, or 45, making the claims unexhausted.

11 C. Procedural Default

12 The doctrine of procedural default generally prohibits a federal court from considering  
13 a specific habeas ground where the state's highest court declined to reach the merits of that claim on  
14 procedural grounds. *See Murray v. Carrier*, 477 U.S. 478 (1986); *Engle v. Isaac*, 456 U.S. 107  
15 (1982). In all cases in which a state prisoner has defaulted his federal claims in state court pursuant  
16 to an independent and adequate state procedural rule, federal habeas review is barred unless he can  
17 demonstrate cause for the default, and actual prejudice, or demonstrate that the failure to consider  
18 the claim will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. 722,  
19 750 (1991). Before a federal court finds procedural default, it must determine that the state court  
20 explicitly invoked a state procedural bar as a separate basis for its decision. *Id.* at 729-30;  
21 *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir.1995), *cert. denied*, 517 U.S. 1150 (1996).  
22 The state rule cited must be "clear, consistently applied, and well-established at the time of the  
23 petitioner's purported default." *Calderon v. United States Dist. Court for the E. Dist. of Cal.*, 96  
24 F.3d 1126, 1129 (9th Cir.1996).

25 Respondents next argue that grounds 43, 44, and 45 are procedurally defaulted in that  
26

1 the Nevada Supreme Court, on appeal from the post-conviction denial, noted as follows:

2 To the extent that appellant raised the underlying claim independent from  
3 the claim of ineffective assistance of counsel, we conclude that the claim  
4 was waived as it could have been raised on appeal from the 2008 judgment  
of conviction, and appellant failed to provide good cause for his failure to  
do so. NRS 34.810(1)(b).

5 Exhibit 140 at 3, n.2;

6 Petitioner offers no argument as to the procedural default argument and it fairly  
7 appears to this court that the portion of these claims related to due process and equal protection  
8 violations separate from the performance of counsel, are in fact, barred by the Nevada Supreme  
9 Court's decision. Thus, that part of the claims shall be dismissed with prejudice.

10 D. Conclusion

11 Petitioner presents numerous claims which cannot be reviewed by this court because  
12 they do not present a cognizable federal claim. Grounds 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 19,  
13 21, 22, 24, 25, 27, 28, 30, 31, 33, 37, 39, 40, 42, and the part of grounds 43 and 45 which claim  
14 independent Fifth and Fourteenth Amendment violations resulting from the ineffective assistance of  
15 counsel shall be dismissed with prejudice.

16 Various grounds of the petition are not exhausted as petitioner has not presented the  
17 same legal theory supported by the same factual pattern to both this and the state courts. As a result,  
18 the state court has not been given a full and fair opportunity to review and resolve the claims set  
19 forth as grounds 2, 11, 23, 29, 35, and the ineffective assistance of counsel claim set forth in ground  
20 44.

21 Finally, the court finds that the due process and equal protection claims advanced in  
22 grounds 43, 44, and 45, unrelated to the effective assistance of counsel have been procedurally  
23 defaulted and that petitioner has made no showing of cause or prejudice to overcome the procedural  
24 bar. Those claims shall be dismissed with prejudice.

25 These various determinations leave petitioner with a mixed petition before the court,  
26

1 as it appears that grounds 5, 8 14, 17, 20, 26, 32, 38, and 40 of the petition are exhausted and  
2 grounds 2, 11, 23, 29, 35, and parts of 43, 44, and 45 are not. A federal court may not entertain a  
3 habeas petition unless the petitioner has exhausted available and adequate state court remedies with  
4 respect to all claims in the petition. *Rose v. Lundy*, 455 U.S. 509, 510 (1982). A “mixed” petition  
5 containing both exhausted and unexhausted claims is subject to dismissal. *Id.* In *Rhines v. Weber*,  
6 544 U.S. 269 (2005), the Supreme Court placed some limitations upon the discretion of this Court to  
7 facilitate habeas petitioners’ return to state court to exhaust claims. The *Rhines* Court stated:

8 [S]tay and abeyance should be available only in limited circumstances.  
9 Because granting a stay effectively excuses a petitioner’s failure to present his  
10 claims first to the state courts, stay and abeyance is only appropriate when the  
11 district court determines there was good cause for the petitioner’s failure to exhaust  
12 his claims first in state court. Moreover, even if a petitioner had good cause for that  
13 failure, the district court would abuse its discretion if it were to grant him a stay  
14 when his unexhausted claims are plainly meritless. *Cf.* 28 U.S.C. § 2254(b)(2)  
15 (“An application for a writ of habeas corpus may be denied on the merits,  
16 notwithstanding the failure of the applicant to exhaust the remedies available in the  
17 courts of the State”).

18 *Rhines*, 544 U.S. at 277.

19 Because the petition is mixed, the court will grant the motion to dismiss in part, and  
20 deny it in part. However, in view of *Rhines*, before the court determines how to handle petitioner’s  
21 mixed petition, the court will grant petitioner an opportunity to show good cause for his failure to  
22 exhaust his unexhausted claims in state court, and to present argument regarding the question  
23 whether or not his unexhausted claims are plainly meritless.

24 Alternatively, petitioner may advise the court of his desire to abandon the  
25 unexhausted claims by filing with the court a sworn declaration of abandonment, signed by the  
26 petitioner, himself.

**IT IS THEREFORE ORDERED** that respondents’ Motion to Dismiss (docket #10)  
is **GRANTED IN PART AND DENIED IN PART.**

**IT IS FURTHER ORDERED** that grounds 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18,

1 19, 21, 22, 24, 25, 27, 28, 30, 31, 33, 37, 39, 40, and 42 are **DISMISSED WITH PREJUDICE**.

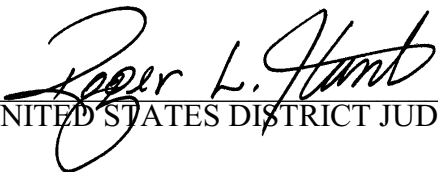
2 **IT IS FURTHER ORDERED** that the due process and equal protection claims in  
3 grounds 43, 44, and 45 and the ineffective assistance of counsel claims in grounds 43 and 45 are  
4 **DISMISSED WITH PREJUDICE**.

5 **IT IS FURTHER ORDERED** that grounds 2, 11, 23, 29, 35, and the ineffective  
6 assistance of counsel claims of grounds 43, 44, and 45 are unexhausted.

7 **IT IS FURTHER ORDERED** that petitioner shall have thirty (30) days from the  
8 date of entry of this Order to show good cause for his failure to exhaust his unexhausted claims in  
9 state court, and to present argument regarding the question whether or not his unexhausted claims are  
10 plainly meritless.

11 **IT IS FURTHER ORDERED** that alternatively, petitioner may advise the Court of  
12 his desire to abandon the unexhausted claims (grounds 2, 11, 23, 29, 35, and the ineffective  
13 assistance of counsel claims of ground 44) by filing a sworn declaration of abandonment, signed by  
14 the petitioner, himself. This declaration shall be filed within the thirty days.

15  
16 Dated this 2<sup>nd</sup> day of June, 2010.

17  
18  
19   
20 UNITED STATES DISTRICT JUDGE  
21  
22  
23  
24  
25  
26